

STATE OF CALIFORNIA
DECISION OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD



SOCIETY OF PROFESSIONAL SCIENTISTS)	
AND ENGINEERS,) .	
)	
Charging Party,)	Case No. SF-CE-284-H
)	
v.)	PERB Decision No. 783-H
)	
REGENTS OF THE UNIVERSITY OF)	December 29, 1989
CALIFORNIA,)	
)	
Respondent.)	
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Appearances: Andrew Thomas Sinclair, Attorney, for Society of Professional Scientists and Engineers; Susan M. Thomas, Attorney, for Regents of the University of California.

Before Hesse, Chairperson; Craib and Camilli, Members.

DECISION

CAMILLI, Member: This case is before the Public Employment Relations Board (PERB or Board) on exceptions filed by the Regents of the University of California (UC) to the proposed decision, attached hereto, of a PERB administrative law judge (ALJ). The ALJ found that the UC violated section 3571(a) and (b)¹ of the Higher Education Employer-Employee Relations Act

¹HEERA is codified at Government Code section 3560 et seq. Unless otherwise indicated, all statutory references are to the Government Code.

Section 3571 states, in pertinent part:

It shall be unlawful for the higher education employer to:

(a) Impose or threaten to impose reprisals on employees, to discriminate or threaten to discriminate against employees, or otherwise to interfere with, restrain, or coerce employees because of their exercise of rights

(HEERA) in denying the Society of Professional Scientists and Engineers (SPSE) access to its internal mail system at the Lawrence Livermore Laboratory.

We have carefully reviewed the entire record, including the proposed decision, transcript, exceptions and responses, and finding the ALJ's findings of fact and conclusions of law free of prejudicial error, we adopt them as the decision of the Board itself. As to SPSE's and the UC's request for attorney fees, the Board finds that the arguments raised by both parties are not "without arguable merit," nor were the arguments made in bad faith. (King City High School District Association et al. (1982) PERB Decision No. 197; Chula Vista School District (1982) PERB Decision No. 256.) Therefore, each party's request for attorney fees is denied.

ORDER

Based upon the foregoing facts, conclusions of law and the entire record in this case, it is found that the Regents of the University of California have violated section 3571, subdivisions (a) and (b) of the Higher Education Employer-Employee Relations Act, by denying the Society of Professional Scientists and Engineers access to the University's internal mail system within the secured facilities at the Lawrence Livermore National Laboratory.

guaranteed by this chapter.

(b) Deny to employee organizations rights guaranteed to them by this chapter.

It is hereby ORDERED that the University and its representatives shall:

1. CEASE AND DESIST FROM:

(a) Denying employee organizations access to its internal mail system, within the secured facilities, at the Lawrence Livermore National Laboratory.

(b) Interfering with employees' rights granted under HEERA by refusing to allow their employee organizations access to the University's internal mail system, within the secured facilities, at the Lawrence Livermore National Laboratory.

2. TAKE THE FOLLOWING AFFIRMATIVE ACTIONS DESIGNED TO EFFECTUATE THE POLICIES OF THE ACT:

(a) Provide payment to the Society of Professional Scientists and Engineers for funds expended on postage for mailings sent through the University's mail system to employees within the secured facilities of the Lawrence Livermore National Laboratory. This award shall begin running six months prior to the filing date of this charge and shall include interest, at the rate of ten percent (10%) per annum, from the date the postage costs were incurred.

(b) Within thirty-five (35) days following the date this Decision is no longer subject to reconsideration, post at work locations where notices to employees are customarily placed at the Laboratory, copies of the notice attached hereto as an appendix. The notice must be signed by an authorized agent of the University, indicating that the University will comply with the terms of this order. Such posting shall be maintained for a

period of thirty (30) consecutive workdays. Reasonable steps shall be taken to insure that the notice is not reduced in size, altered, defaced or covered by any other material.

(c) Written notification of the actions taken to comply with this Order shall be made to the San Francisco Regional Director of the Public Employment Relations Board in accordance with her instructions.

Chairperson Hesse and Member Craib joined in this Decision.

APPENDIX



NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD
An Agency of the State of California

After a hearing in Unfair Practice Case No. SF-CE-284-H, Society of Professional Scientists and Engineers v. Regents of the University of California, in which all parties had the right to participate, it has been found that the University violated Government Code section 3571, subdivisions (a) and (b) of the Higher Education Employer-Employee Relations Act (HEERA).

As a result of this conduct we have been ordered to post this Notice, and will abide by the following. We will:

1. CEASE AND DESIST FROM:

(a) Denying employee organizations access to the University's internal mail system within the secured facilities of the Lawrence Livermore National Laboratory.

(b) Interfering with employees' rights granted under HEERA by refusing to allow their employee organizations access to the University's internal mail system within the secured facilities of the Lawrence Livermore National Laboratory.

2. TAKE THE FOLLOWING AFFIRMATIVE ACTIONS DESIGNED TO EFFECTUATE THE POLICIES OF THE ACT:

(a) Provide payment to the Society of Professional Scientists and Engineers for funds expended on postage for mailings sent through the University's mail system to employees within the secured facilities of the Lawrence Livermore National Laboratory. This award shall begin running six months prior to the filing date of this charge and shall include interest, at the rate of ten percent (10%) per annum, from the date the postage costs were incurred.

Dated: _____ REGENTS OF THE UNIVERSITY
OF CALIFORNIA

By _____
Authorized Agent

THIS IS AN OFFICIAL NOTICE. IT MUST REMAIN POSTED FOR AT LEAST THIRTY (30) CONSECUTIVE WORKDAYS FROM THE DATE OF POSTING AND MUST NOT BE REDUCED IN SIZE, DEFACED, ALTERED OR COVERED BY ANY MATERIAL.

STATE OF CALIFORNIA
PUBLIC EMPLOYMENT RELATIONS BOARD



SOCIETY OF PROFESSIONAL)	
SCIENTISTS AND ENGINEERS,)	
)	Unfair Practice
Charging Party,)	Case No. SF-CE-284-H
)	
V.)	
)	PROPOSED DECISION
REGENTS OF THE UNIVERSITY)	(6/8/89)
OF CALIFORNIA,)	
)	
Respondent.)	

Appearances: Andrew Thomas Sinclair, Attorney, for Society of Professional Scientists and Engineers; Susan M. Thomas, Attorney, for Regents of the University of California.

Before James W. Tamm, Administrative Law Judge.

PROCEDURAL HISTORY

On October 12, 1988, the Society of Professional Scientists and Engineers (hereafter SPSE or Charging Party) filed this charge against the Regents of the University of California (hereafter University). The charge alleges the University denied SPSE its right to use the internal mail system of the University's Lawrence Livermore National Laboratory, in violation of section 3571(a), and (b) of the Higher Education Employer Employee Relations Act (hereafter HEERA).¹ On

¹The HEERA is codified at Government Code section 3560, et seq. Section 3571 reads, in pertinent part:

It shall be unlawful for the higher education employer to:

(a) Impose or threaten to impose reprisals on employees, to discriminate or threaten to discriminate against employees, or otherwise to interfere with, restrain, or coerce employees because of their exercise of rights guaranteed by this chapter.

This proposed decision has been appealed to the Board itself and may not be cited as precedent unless the decision and its rationale have been adopted by the Board.

December 2, 1988, a complaint was issued by the General Counsel's office of the Public Employment Relations Board (hereafter PERB or Board). A settlement conference was held, but the matter remained unresolved. A formal hearing was completed February 2, 1989. A transcript was prepared, briefs filed, and the case was submitted for decision on May 24, 1989.

FINDINGS OF FACT

Charging Party is an employee organization and is a non-exclusive representative of employees at the University's Lawrence Livermore National Laboratory (hereafter Laboratory). There is no exclusive representative for those employees represented by SPSE.

The Laboratory is administered under a contract between the University and the United States government. The Laboratory work consists of research, development and educational activities related to the nuclear sciences, and to the use of energy in selected military and peaceful applications.

The main Laboratory site is a highly secured facility of approximately one square mile. No one is allowed within the secured area without a high level security clearance from the United States government. In addition to the Laboratory's main site, there is a location known as site 300, which is

(b) Deny to employee organizations rights guaranteed to them by this chapter,.

approximately fifteen miles from the Laboratory. An additional site, known as the CDC building, is approximately one mile from the Laboratory, and a warehouse is adjacent to the main Laboratory facility. In addition, a limited number of Laboratory employees are assigned to temporary locations throughout the world. Approximately five percent of Laboratory employees work at locations outside the main secured area.

Inside the secured area at the Laboratory, there are no postal routes. All mail delivered inside the secured area, through the University's mail system, is picked up outside the secured area and then taken inside by a Laboratory employee with a security clearance. It is then delivered to the designated locations by Laboratory personnel with security clearances. The delivery of mail within the secured area does not require the crossing of any United States postal routes. When employees are assigned to locations outside the secured area, their mail is forwarded to them via postal routes by the Laboratory mail room.

On June 21, 1988, Richard White sought, on behalf of Charging Party, to send unstamped letters from the SPSE president to SPSE members through the internal Laboratory mail system. The purpose of the letter was to inform members of a meeting to be held in July 1988 and to test the Laboratory's willingness to deliver unstamped union mail. On June 28, 1988, Robert Perko, division leader of the Laboratory's Office of Staff Relations, notified the Charging Party that the Laboratory would not deliver SPSE mail through its internal mail system without proper United

States postage. SPSE then affixed United States postage to the letters and mailed them at the Livermore Post Office. The letters were then delivered to SPSE members through the Laboratory mail system. SPSE has mailed flyers to its 200 members approximately three to five times during the past year.

Laboratory policy² states that the Laboratory mail system may not be used for other than official Laboratory business and the distribution of United States mail. There were, however, examples of third parties having access to the internal Laboratory mail system for both commercial and social messages. For instance, an advertisement soliciting membership in a local swimming club was delivered to Laboratory employees through the Laboratory mail system, as was a commercial advertisement for the sale of computer equipment. Both were delivered to employees without having United States postage affixed to the mail. The mail services group leader at the Laboratory testified that these examples were mistakes, and were not consistent with the training given to Laboratory mail system employees.

The total volume of mail processed each day at the Laboratory is approximately 32,000 pieces, or between seven and eight million pieces per year. The group leader testified however, that even a mailing as limited as SPSE's newsletter to 200 employees would create a burden upon the system because it would create more work. The mail system at the Laboratory is

²Laboratory Personnel Policies and Procedures Manual section J.II.5.

currently suffering from understaffing due to budgetary-constraints. One staff position was transferred and an open position was frozen. Furthermore, since the mail room gives intra-Laboratory mail a higher priority than first class mail coming through the United States postal system, additional intra-Laboratory employee organization mail could create a burden on the mail room in meeting its set priorities.

Dr. Calvin Andre of SPSE testified that, because the cost of United States postage is such a small portion of the cost attributed to each mailing, the number of SPSE mailings each year would probably not increase appreciably, even if the postage was not required.

Employee organizations have several other avenues of access to employees at the Laboratory. They may schedule rooms for conducting employee meetings. They may set up tables and portable easels at certain locations within the Laboratory, and may post literature on bulletin boards. They may hand out literature and personally discuss issues with employees. They are able to set up boxes in certain areas of the Laboratory, where they can keep stacks of literature available for employees to select, as they pass by. They also have access to home addresses of employees, so they may mail literature directly to employees at home. Organizations may also place literature directly in individual mail boxes. Finally, the Laboratory will deliver the mail through the internal mail system if United States postage is affixed.

ISSUE

Did the University violate HEERA section 3571(a) and (b) by denying the Charging Party access to the University's internal mail system at the Lawrence Livermore National Laboratory?

DISCUSSION

HEERA section 3568 states:

Subject to reasonable regulations, employee organizations shall have the right of access at reasonable times to areas in which employees work, the right to use institutional bulletin boards, mailboxes and other means of communication, and the right to use institutional facilities at reasonable times for the purpose of meetings concerned with the exercise of the rights guaranteed by this act.

In interpreting this section, the Board first required employee organization access to the University's mail system in University of California at Berkeley (Wilson) (1981) PERB Decision No. 183-H. This holding was consistent with its earlier interpretation of nearly identical language in the Educational Employment Relations Act (EERA)³. Richmond Unified School District and Simi Valley Unified School District (1979) PERB

³The EERA is codified at Government Code section 3560 et seq. Section 3543.1(b) states:

Employee organizations shall have the right of access at reasonable times to areas in which employees work, the right to use institutional bulletin boards, mailboxes, and other means of communication, subject to reasonable regulation, and the right to use institutional facilities at reasonable times for the purpose of meetings concerned with the exercise of the rights guaranteed by this chapter.

Decision No. 99. In that decision, the Board held that the Legislature intended to include use of internal school mail systems as one of the "other means of communications" available to employee organizations

In University of California at Berkeley (Wilson), supra, the Board rejected several University defenses. Among them:

- (1) HEERA does not require the University to deliver unstamped employee organization mail through the University's internal mail system;
- (2) numerous alternative methods of access are available to employee organizations; and
- (3) mandating employee organization access to the University's mail system would be burdensome to the University, therefore, denial of access is justified by operational necessity.

The Board declined to rule on the applicability of the Private Express Statutes⁴ to employee organization access rights.

On appeal, the court remanded the case to the Board to consider the effect of the federal law upon its earlier decision. Regents of the University of California v. Public Employment Relations Board (1983) 139 Cal.App.3d 1037 [189 Cal.Reptr. 298]

On remand, the Board determined that exceptions to the Private Express Statutes allowed the University to carry

⁴18 U.S.C, sections 1693-1699; 39 U.S.C, sections 601-606. These statutes establish the postal monopoly of the United States Postal Service and generally prohibit the private carriage of letters over postal routes without the payment of postage.

unstamped employee organization mail through its internal mail system. The Board once again rejected all the University's defenses based upon the burden to the mail system, the availability of alternative access methods, and interpretations of HEERA access provisions. University of California at Berkeley (Wilson) (1984) PERB Decision No. 420-H, affirmed 182 Cal.App.3d 71. [227 Cal.Rptr. 57]

That decision was ultimately appealed to the United States Supreme Court which held that the Private Express Statutes prevented the University from carrying unstamped union mail through its internal mail system when it crossed United States postal routes, and would therefore compete with the United States Postal Service. Regents of the University of California v. Public Employment Relations Board (1988) 485 US ____ [99 L.Ed. 2d 664, 108 S.Ct. 1404].

Both the California Court of Appeal and the United States Supreme Court limited their review to the applicability of Private Express Statutes and did not reverse the Board's rejection of other University defenses. In its most recent decision on this issue, University Council, AFT v. Regents of the University of California (1989) PERB Decision No. 725-H, (A045723 app.pending) the Board re-asserted its earlier rejection of the University defenses which were not based upon Private Express Statutes. Thus, to the extent that it does not conflict with Private Express Statutes by crossing postal routes, the

University is still required to deliver unstamped mail of employee organizations through the University mail system.

There is nothing in the record of this case justifying a departure from the Board's earlier holding that employee organizations should have access to the University's internal mail system.⁵ Evidence of alternative means of an employee organization's access to employees does not justify denial of employee organization access to the mail system. The Board has consistently rejected that defense in situations where alternative means of communication were less restrictive than this case. Here, where many alternative means of communications are tempered by stringent security restrictions at the Laboratory, alternative means provide even less justification than in earlier Board cases for denying access to the mail system. In both of the University of California at Berkeley (Wilson), supra, cases and University Council. AFT v. Regents of the University of California, supra, as well as Richmond Unified School District and Simi Valley Unified School District, supra, the Board rejected the argument that alternative means of communications justifies denial of access to a particular means of communication. The Board held that the right of access

⁵The evidence that the mail system has been used, postage free, by other outside entities is not relied upon in this case as a basis for extending access to the system to employee organizations. The limited number of examples of outside organizations' use of the mail system appears to be evidence of simple mistakes made by employees trying to grapple with millions of pieces of mail each year. Such use is contrary to both University policy and training given to mail system employees and does not reflect disparate treatment of employee organizations.

extends to each statutorily recognized method of communication and that alternative methods are relevant only when a particular means is shown to be disruptive or burdensome. University Council, AFT v. Regents of the University of California, supra at p.8-9.

There is also no greater showing of any burden to the mail system here, than in any previous Board decision. The few hundred pieces of SPSE mail sent through the system pales in comparison to the yearly seven to eight million pieces of other Laboratory mail. Even if the amount of employee organization mail increases due to increased SPSE mailings, or additional employee organizations utilizing the system, that mail would be no more burdensome than an increase in mail sent by any University department. Furthermore, if United States postage were affixed, the University admits that all employee organization mail would be accommodated by the system. The issue, therefore, is not the burden to the system, but rather the cost to the employee organizations.

The University also argues that any additional mail creates a burden on the system because the system suffers from severe budgetary constraints. Because of those budgetary problems, one staff position was transferred and an open position was frozen. According to the University, this understaffing, in conjunction with a high volume of mail, creates problems in meeting its delivery objectives. This argument, however, is unpersuasive. The University can not avoid its legal obligation to allow

employee organization access to the mail system because of understaffing in the mail room, any more than it can avoid its collective bargaining obligations under HEERA by understaffing its employee relations function.

The University also argues it will be difficult to ensure that unstamped employee organization mail will be limited to areas without postal routes. However, this decision is limited by the facts of this case, to an area where there are no postal routes whatsoever. It will be no more burdensome to the mail system to refuse to forward mail to locations outside the Laboratory secured area, than it has been in the past for the Laboratory to refuse to deliver all unstamped Union mail.⁶

While the record supports a finding that any additional mail, from any source, would increase the burden upon an already busy system, the evidence does not demonstrate that unstamped employee organization mail will unduly burden the system to the point of justifying its exclusion.

CONCLUSION

Since the Lawrence Livermore National Laboratory is a secured facility without any United States postal routes on its grounds, delivery of unstamped employee organization mail within the facility would not conflict with Private Express Statutes. The Charging Party, therefore, has a right of access to the mail

⁶Many of the University's arguments were more appropriate to a systemwide case. Because this case is not systemwide, but rather one limited to a single location without any postal routes, it is unnecessary to deal with the University's systemwide arguments.

system within the secured facilities at the Laboratory. The University's failure to deliver SPSE's unstamped mail is therefore a violation of section 3571(a) and (b).

REMEDY

Section 3563.3 gives the PERB broad powers to remedy unfair practices, specifically including the power to issue cease and desist orders. Since it has been found that the University unreasonably denied Charging Party access to its internal mail system for unstamped mail, it will be ordered to cease and desist from denying such access for the purpose of communication with employees at the secured facilities of the Lawrence Livermore National Laboratory.

Under the circumstances presented here, it is also appropriate to order the University to make the Charging Party whole for losses incurred because of the violation. This shall consist of the cost of postage the Charging Party has expended in its mailings to Laboratory employees. This remedy shall begin running six (6) months prior to the filing date of this charge and shall include interest, at the rate of ten percent (10%) per annum, from the date the postage costs were incurred.

In addition, it is appropriate that the University be required to post a notice at the Laboratory incorporating the terms of the order. Posting of such notice will provide employees with notice that the University has acted in an unlawful manner and is being required to cease and desist from such activity. It effectuates the purposes of HEERA that

employees be informed of the resolution of the controversy, and the posting will announce Respondent's readiness to comply with the ordered remedy. See Placerville Union School District (1978) PERB Decision No. 69. In Pandol and Sons v. Agricultural Labor Relations Board (1979) 98 Cal.App.3d 580, 587 [159 Cal.Rptr. 584], the California District Court of Appeal approved a similar posting requirement. See also NLRB v. Express Publishing Co. (1941) 312 U.S. 426 [8 LRRM 415].

ORDER

Based upon the foregoing facts, conclusions of law and the entire record in this case, it is found that the Regents of the University of California have violated section 3571, subdivisions (a) and (b) of the Higher Education Employer-Employee Relations Act by denying the Society of Professional Scientists and Engineers access to the University's internal mail system within the secured facilities at the Lawrence Livermore National Laboratory.

It is hereby ORDERED that the University and its representatives shall:

1. CEASE AND DESIST FROM:

(a) Denying employee organizations access to its internal mail system, within the secured facilities, at the Lawrence Livermore National Laboratory.

(b) Interfering with employees' rights granted under HEERA by refusing to allow their employee organizations access to

the University's internal mail system, within the secured facilities, at the Lawrence Livermore National Laboratory.

2. TAKE THE FOLLOWING AFFIRMATIVE ACTIONS DESIGNED TO EFFECTUATE THE POLICIES OF THE ACT:

(a) Provide payment to the Society of Professional Scientists and Engineers for funds expended on postage, for mailings sent through the University's mail system to employees within the secured facilities of the Lawrence Livermore National Laboratory. This award shall begin running six months prior to the filing date of this charge and shall include interest, at the rate of ten percent (10%) per annum, from the date the postage costs were incurred.

(b) Within ten (10) workdays of service of a final decision in this matter, post at work locations where notices to employees are customarily placed at the Laboratory, copies of the notice attached hereto as an appendix. The notice must be signed by an authorized agent of the University, indicating that the University will comply with the terms of this order. Such posting shall be maintained for a period of thirty (30) consecutive workdays. Reasonable steps shall be taken to insure that the notice is not reduced in size, altered, defaced or covered by any other material.

(c) Upon issuance of a final decision, make written notification of the actions taken to comply with the Order to the San Francisco Regional Director of the Public Employment Relations Board in accordance with her instructions.

Pursuant to California Administrative Code, title 8, part III, section 32305, this Proposed Decision and Order shall become final unless a party files a statement of exceptions with the Board itself at the headquarters office in Sacramento within 20 days of service of this Decision. In accordance with PERB regulations, the statement of exceptions should identify by page citation or exhibit number the portions of the record, if any, relied upon for such exceptions. See California Administrative Code, title 8, Part III, section 32300. A document is considered "filed" when actually received before the close of business (5:00 p.m.) on the last day set for filing. ". . . or when sent by telegraph or certified or Express United States mail, postmarked not later than the last day set for filing" See California Administrative Code, title 8, part III, section 32135. Code of Civil Procedure section 1013 shall apply. Any statement of exceptions and supporting brief must be served concurrently with its filing upon each party to this proceeding. Proof of service shall accompany each copy served on a party or filed with the Board itself. See California Administrative Code, title 8, part III, sections 32300, 32305 and 32140.

Dated: June 8, 1989

JAMES W. TAMM
Administrative Law Judge